

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term 2002

5 (Argued June 23, 2003 Decided August 21, 2003)

6 Docket No. 02-5060

7 -----x
8 CENTRAL VERMONT PUBLIC SERVICE CORPORATION,
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10 Defendant-Appellant,

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12 -- v. --

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16 HAROLD HERBERT and EDITH HERBERT,
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18 Plaintiffs-Appellees.

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20 -----x
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22 B e f o r e : WALKER, Chief Judge, STRAUB and POOLER, Circuit
23 Judges.

24 Appeal from an order by the United States District Court for
25 the District of Vermont (J. Garvan Murtha, Judge), denying
26 appellant's Fed. R. Civ. P. 60(b)(4) motion for relief from a
27 bankruptcy court order permanently enjoining it from pursuing
28 civil claims against the appellees.

29 AFFIRMED.

30
31 JAMES B. ANDERSON, Ryan, Smith
32 & Carbine, Ltd., Rutland, VT,
33 for Appellant.

MARY P. KEHOE, Lisman,
Webster, Kirkpatrick &
Leckerling, P.C., Burlington,
VT, for Appellee.

JOHN M. WALKER, JR., Chief Judge:

Defendant-appellant Central Vermont Public Service Corp.
("CVPS") appeals from the district court's order denying its Fed.
R. Civ. P. 60(b)(4) motion. In that motion, CVPS sought relief
from a bankruptcy court order permanently enjoining it from
pursuing civil claims against the appellees Harold and Edith
Herbert ("the Herberts"). After waiting more than four years to
challenge the bankruptcy court injunction, CVPS contended that
the bankruptcy court order was void for lack of jurisdiction.
The district court ruled that the Rule 60(b)(4) motion was
untimely and rejected CVPS's jurisdictional argument. Although
the district court's untimeliness ruling was in error, we agree
that the bankruptcy court at least had an arguable basis for
exercising its jurisdiction, and accordingly, we affirm the
district court's denial of CVPS's Rule 60(b)(4) motion.

I. BACKGROUND

In 1993, the Herberts purchased the mortgage and security
agreements encumbering Pico Ski Resort in southern Vermont. In
1995, they foreclosed against the resort and incorporated it as
"Pico Mountain, Inc." (d/b/a Pico Mountain Resort), which they
owned and controlled as shareholders, officers, and directors.

1 In July 1996, the Herberts formed two new entities: Sherburne
2 Pass Mountain Properties, LLC, to which the Herberts conveyed all
3 of the resort's real estate; and Pico Mountain Operating Company,
4 to which they conveyed all of the resort's personal property
5 assets. Less than one month later, their original company, Pico
6 Mountain, Inc. filed a Chapter 7 petition in bankruptcy, listing
7 no significant assets and \$2.7 million in unsecured debts. In
8 December 1996, the Herberts conveyed the resort's real property
9 from Sherburne Pass Mountain Properties, LLC, to Pico Management
10 and conveyed the personal assets of Pico Mountain Operating
11 Company to American Skiing Company. It appears from the
12 appellate record that the Herberts controlled Pico Management,
13 but not American Skiing Company. The December 1996 sales
14 directly and indirectly yielded \$2.5 million in benefits to the
15 Herberts, which they did not disburse to the creditors of Pico
16 Mountain, Inc., including CVPS.

17 In January 1997, CVPS filed a proof of claim in the Pico
18 Mountain, Inc. Chapter 7 proceeding for the cost of the
19 electrical power it had supplied to the resort. Pico Management
20 placed \$214,802.79 in escrow to pay the CVPS electrical power
21 bill for utilities. Meanwhile, the trustee of the bankruptcy
22 estate of Pico Mountain, Inc. investigated causes of action
23 against the Herberts for alleged breaches of fiduciary duty
24 toward the debtor. This issue was resolved when the trustee

1 entered into a settlement agreement whereby the Herberts agreed
2 to pay the lesser of \$120,000 or thirty percent of the allowed
3 unsecured claims against the debtor. In an adversary proceeding,
4 the trustee sought bankruptcy court approval of the settlement
5 and filed a complaint in that court to enjoin all creditors,
6 including CVPS, from bringing actions against the Herberts
7 "through any derivative or alter ego claim[s] regarding a Pico
8 Mountain, Inc. debt."

9 On June 16, 1997, the trustee's summons and complaint were
10 served on CVPS. CVPS does not dispute that it failed to enter an
11 appearance or defend against the trustee's action.¹ On October
12 29, 1997, Bankruptcy Judge Francis G. Conrad approved the
13 settlement and entered an injunction barring creditors of the
14 bankruptcy estate from pursuing any claim, direct or derivative,
15 against the Herberts. Canney v. AEI Music Network (In re Pico
16 Mountain, Inc.), No. 96-10756, Adv. Proceeding No. 97-1036
17 (Bankr. D. Vt. Oct. 29, 1997). On December 2, 1997, Judge Conrad
18 entered a default judgment against those defendants that had not

¹ CVPS asserts that "[i]t is not even clear that [it] ever received the summons, complaint, and pre-trial order the Trustee mailed on June 6, 1997. With 249 defendants served by first class mail, it is possible clerical errors were made." When asked about this assertion at oral argument, CVPS admitted that there is nothing to support it beyond the claim that CVPS's files did not contain the referenced documents when they were searched in preparation for the filing of the complaint in the instant action. In other words, the assertion is pure speculation, and it should not have been made.

1 answered the trustee's complaint, including CVPS, and ordered
2 that the trustee was not required to serve those defendants with
3 copies of the injunction.

4 CVPS concedes that it learned of the injunction from the
5 Herberts' counsel on December 15, 1997, less than two months
6 after the injunction and less than two weeks after the default
7 judgment was entered against it. Nevertheless, CVPS waited more
8 than four years - until February 13, 2002 - to challenge the
9 injunction by filing a Rule 60(b)(4) motion. This attack on the
10 injunction was prompted by a suit filed by the Herberts in
11 Chittenden Superior Court. That suit seeks to reclaim the moneys
12 that Pico Management had placed in escrow, on the basis that the
13 settlement and the related injunction barred CVPS's claims for
14 those moneys. In its motion papers, CVPS invoked Rule 60(b)(4)'s
15 provision that "the court may relieve a party . . . from a final
16 judgment, order, or proceeding [if] the judgment is void," and
17 argued that the injunction was void for lack of subject-matter
18 jurisdiction.

19 In an oral ruling on June 18, 2002, the bankruptcy court
20 denied the motion as both untimely, citing Beller & Keller v.
21 Tyler, 120 F.3d 21 (2d Cir. 1997), and without merit because the
22 bankruptcy court had an arguable jurisdictional basis for its
23 order, citing Nemaizer v. Baker, 793 F.2d 58 (2d Cir. 1986). On
24 October 3, 2002, the district court affirmed the bankruptcy

1 court's denial of the motion on both grounds. CVPS now appeals
2 from the judgment of the district court.

3 II. DISCUSSION

4 A. Standard of Review

5 Generally, we review Rule 60(b) motions for abuse of
6 discretion. Lawrence v. Wink, 293 F.3d 615, 623 (2d Cir. 2002).
7 However, a district court's ruling on a Rule 60(b)(4) motion is
8 reviewed de novo where "there are no disputes over the subsidiary
9 facts pertaining to [the] issue" of jurisdiction. United States
10 v. Forma, 42 F.3d 759, 762 (2d Cir. 1994). "Under Rule 60(b)(4)
11 a deferential standard of review is not appropriate because if
12 the underlying judgment is void, it is a per se abuse of
13 discretion for a district court to deny a movant's motion to
14 vacate the judgment under Rule 60(b)(4)." Jalapeno Prop. Mgmt.,
15 LLC v. Dukas, 265 F.3d 506, 515 (6th Cir. 2001) (Batchelder, J.,
16 concurring) (citations and quotation marks omitted); see also
17 Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.,
18 804 F.2d 311, 314 (5th Cir. 1986) ("[T]he district court has no
19 discretion [in ruling on a 60(b)(4) motion], the judgment is
20 either void or it is not."). Almost every Circuit has adopted
21 de novo review of Rule 60(b)(4) motions, and we know of no
22 Circuit that defers to the district court on a Rule 60(b)(4)
23 ruling. See Vinten v. Jeantot Marine Alliances, S.A., 191 F.
24 Supp. 2d 642, 649-50 & nn.12-13 (D. S.C. 2002) (collecting

cases); see also Page v. Schweiker, 786 F.2d 150, 152 (3d Cir. 1986).

B. Timeliness

At the outset, CVPS argues that the district court erred in ruling that the motion was not timely. Even though Rule 60(b) states that "[t]he motion must be made in a reasonable time," courts have been "exceedingly lenient in defining the term 'reasonable time,' with respect to voidness challenges. In fact, it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void 'may be brought at any time.'" Beller & Keller, 120 F.3d at 24 (quoting 12 James Wm. Moore, et al., Moore's Federal Practice § 60.44[5][c] (3d ed. 2003)). We conclude that the district court erred in finding that CVPS's motion was untimely.

C. Bankruptcy Court Jurisdiction to Enter the Underlying Order

CVPS argues that the bankruptcy court's order was void for lack of subject matter jurisdiction. CVPS contends that the bankruptcy court issued a final order in a non-core proceeding without the parties' consent and without a district court's de novo review, and that therefore it exceeded its jurisdiction under Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion), and 28 U.S.C. § 157. Where bankruptcy courts have exceeded their jurisdiction in non-core proceedings, we have not hesitated to vacate the bankruptcy

1 court judgment on direct appeal. See, e.g., Orion Pictures Corp.
2 v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d
3 1095, 1102-03 (2d Cir. 1993); see also Cathedral of the
4 Incarnation v. Garden City Co. (In re Cathedral of the
5 Incarnation), 90 F.3d 28, 34 n.5 (2d Cir. 1996); Gallucci v.
6 Grant (In re Gallucci), 931 F.2d 738, 744 (11th Cir. 1991).

7 However, this case comes to us, not on direct appeal, but on
8 appeal from a denial of a Rule 60(b)(4) motion through which CVPS
9 seeks to overturn a final default judgment. Because "final
10 judgments should not be lightly reopened, [Rule 60(b)] may not be
11 used as a substitute for timely appeal. . . . Since 60(b) allows
12 extraordinary relief, it is invoked only upon a showing of
13 exceptional circumstances." Nemaizer, 793 F.2d at 61-62
14 (citations omitted). In the context of a Rule 60(b)(4) motion, a
15 judgment may be declared void for want of jurisdiction only when
16 the court "plainly usurped jurisdiction," or, put somewhat
17 differently, when "there is a total want of jurisdiction and no
18 arguable basis on which it could have rested a finding that it
19 had jurisdiction." Id. at 65 (internal quotation marks and
20 citations omitted).

21 CVPS claims that the bankruptcy court's injunction is void
22 under Marathon because the court lacked jurisdiction to
23 adjudicate pre-petition state law rights. In Marathon, the
24 Supreme Court held that Congress could not constitutionally

1 empower a bankruptcy court, which is not an Article III court, to
2 adjudicate a state breach-of-contract action (based on a pre-
3 petition contract) brought by a debtor against a defendant that
4 had not filed a claim with the bankruptcy court. See 458 U.S. at
5 85. The Supreme Court observed that "our Constitution reserves
6 for Art[icle] III courts" traditional functions of the judicial
7 power such as adjudicating state breach-of-contract claims like
8 debtor's claim in that case. Id. at 83. The Marathon Court
9 found unconstitutional the Bankruptcy Act of 1978's broad grant
10 of jurisdiction to the bankruptcy courts to adjudicate such state
11 law claims.

12 In the wake of Marathon, Congress passed the Bankruptcy
13 Amendments and Federal Judgeship Act of 1984 ("1984 Amendments"),
14 categorizing "core" and "non-core" proceedings. 28 U.S.C. § 157.
15 Core proceedings are actions essential or basic to the
16 administration of a bankruptcy case, and Congress offered a non-
17 exhaustive list of such actions. 28 U.S.C. § 157(b)(2). In a
18 core proceeding, a bankruptcy court may "enter appropriate
19 [final] orders and judgments." § 157(b)(1). Where a bankruptcy
20 court acts in a non-core proceeding, a final order may be issued
21 only in one of two ways: by the district court after de novo
22 review of the bankruptcy court's proposed factual findings and
23 legal conclusions, § 157(c)(1); or by the bankruptcy court with
24 the consent of the parties, § 157(c)(2). See generally Orion

1 Pictures Corp., 4 F.3d at 1100-01. In this case, because the
2 district court did not originally review nor independently
3 adjudicate the bankruptcy court's order enjoining CVPS from
4 pursuing its state claims against the Herberts, bankruptcy
5 jurisdiction can exist only if the proceeding was core or was
6 consented to by the parties.

7 As noted above, when reviewing the denial of a Rule 60(b)(4)
8 motion to vacate for want of jurisdiction, we consider only
9 whether there is at least an arguable basis for jurisdiction. If
10 so, we will not disturb the judgment on jurisdictional grounds.
11 In this case, we easily conclude that there is, at a minimum, an
12 arguable basis for bankruptcy court jurisdiction, because CVPS's
13 claims are arguably part of the core proceeding before the
14 bankruptcy court and because CVPS consented to the bankruptcy
15 court's jurisdiction.

16 The non-exhaustive list of "core proceedings" in the 1984
17 Amendments includes: "matters concerning administration of the
18 estate," 28 U.S.C. § 157(b)(2)(A), "proceedings to . . . recover
19 fraudulent conveyances," § 157(b)(2)(H), and "other proceedings
20 affecting . . . the adjustment of the debtor-creditor . . .
21 relationship," § 157(b)(2)(O). The 1984 Amendments clarified
22 that "[a] determination that a proceeding is not a core
23 proceeding shall not be made solely on the basis that its
24 resolution may be affected by State law." § 157(b)(3). Since

1 the 1984 Amendments, "both the Supreme Court and this court have
2 concluded that the Marathon holding was a narrow one and have
3 broadly construed the jurisdictional grant in the 1984 Bankruptcy
4 Amendments." See S.G. Phillips Constructors, Inc. v. City of
5 Burlington (In re S.G. Phillips Constructors, Inc.), 45 F.3d 702,
6 707 (2d Cir. 1995) (citations omitted). "[B]ankruptcy courts are
7 not precluded from adjudicating state-law claims [as core
8 proceedings] when such claims are at the heart of the
9 administration of the bankruptcy estate." Ben Cooper, Inc. v.
10 Ins. Co. of the State of Pa. (In re Ben Cooper), 896 F.2d 1394,
11 1399 (2d Cir.), vacated, 498 U.S. 964 (1990), reinstated, 924
12 F.3d 36 (2d Cir. 1991). A finding that a proceeding is core, we
13 have held, may be based upon the "nature of the proceeding," S.G.
14 Phillips Constructors, 45 F.3d at 706, and "the ramifications of
15 the dispute on the administration of the estate," Shugrue v. Air
16 Line Pilots Ass'n Int'l (In re Ionosphere Clubs, Inc.), 922 F.2d
17 984, 994 (2d Cir. 1990).

18 The distinction between core and non-core is somewhat
19 subjective and contextual, and we need not determine whether the
20 injunction in this case was actually part of a core proceeding,
21 because the issue before us is only whether the bankruptcy court
22 arguably had jurisdiction. Here we conclude that the proceeding
23 was arguably core. As part of a settlement by which the Herberts
24 contributed to the bankruptcy estate, the injunction, at least

1 arguably, was "at the heart of the administration of the
2 bankruptcy estate," had significant "ramifications . . . for the
3 administration of the estate," or was core because of the "nature
4 of the proceeding."

5 Moreover, even if the injunction in itself was not part of a
6 core proceeding as defined by the 1984 Amendments, CVPS's claims
7 against the Herberts also were arguably subject to bankruptcy
8 court jurisdiction based upon CVPS's filing a proof of claim in
9 the bankruptcy court in January 1997, almost a year before the
10 bankruptcy court's injunction. Our cases have upheld bankruptcy
11 jurisdiction in what would otherwise be non-core proceedings
12 where the party opposing the finding of jurisdiction has filed a
13 proof of claim. In doing so, we have relied on two theories: (1)
14 the proof of claim transforms litigation into a core proceeding;
15 and (2) by filing the proof of claim, the creditor consents to
16 the bankruptcy court's broad equitable jurisdiction. See S.G.
17 Phillips Constructors, 45 F.3d at 706 ("The City, by filing its
18 proof of claim in this case, not only triggered § 157(b)(2)(B) [a
19 listed core proceeding in allowing claims against an estate and
20 estimating claims for the purposes of confirming a plan], but
21 also necessarily submitted to the court's equitable power to
22 resolve its claims."); see also Cibro Petroleum Prods. v. City of
23 Albany (In re Winmo Realty Corp.), 270 B.R. 108, 120 & n.7
24 (S.D.N.Y. 2001) (citing numerous cases in which filing proof of

1 claim is a sufficient basis for finding the proceeding core); Pan
2 American World Airways, Inc. v. Evergreen Int'l Airlines, 132
3 B.R. 4, 7 (S.D.N.Y. 1991) ("When a creditor files a proof of
4 claim it submits itself to the bankruptcy court's equitable
5 power, and the claims, even though arising under state law,
6 become core proceedings within the jurisdiction of the bankruptcy
7 court."); cf. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 59
8 n.14 (1989) ("[B]y submitting a claim against the bankruptcy
9 estate, creditors subject themselves to the court's equitable
10 power to disallow those claims"); Orion Pictures Corp., 4
11 F.3d at 1102 (holding "breach-of-contract action by a debtor
12 against a party to a pre-petition contract, who has filed no
13 claim with the bankruptcy court, is non-core"). The foregoing
14 authorities establish that after CVPS filed its proof of claim
15 against Pico Mountain, the bankruptcy court had an arguable basis
16 for jurisdiction to enter its injunction against CVPS.

17 One could argue that CVPS's proof of claim gave the
18 bankruptcy court core jurisdiction only over CVPS's claims
19 against Pico Mountain, Inc. and not over its claims against the
20 Herberts. However, CVPS's claims against the Herberts are state
21 law claims arising from the Herberts' alter ego relationship with
22 Pico Mountain or the Herberts' liability for Pico Mountain's
23 debts. In the context of cases such as this, we have ruled that
24 the trustee is "the proper person to assert claims

1 against the debtor's alter ego or others who have misused the
2 debtors property in some fashion," and by extension, we have held
3 that such alter ego claims are core proceedings. St. Paul Fire
4 and Marine Ins. Co. v. Pepsico, Inc., 884 F.2d 688, 701 (2d Cir.
5 1989). As long as state law permits alter ego tort claims or
6 similar actions, such actions are core proceedings because they
7 "relate[] to the property of the estate," and "bring[] property
8 into the estate of the debtor," particularly as a proceeding to
9 "recover fraudulent conveyances" under 28 U.S.C. 157(b) (2) (H).
10 Id. (internal quotations and citations omitted).

11 In this case, the trustee's complaint for injunctive relief
12 specifically cited the creditors' "derivative or alter-ego
13 claim[s]," and CVPS now bases its state claims against the
14 Herberts, in part, on Vermont's alter ego doctrine and similar
15 claims of incorporator liability and breach of fiduciary duty,
16 citing Winey v. Cutler, 678 A.2d 1261 (Vt. 1996), Hardwick-
17 Morrison Co. v. Albertsson, 605 A.2d 529 (Vt. 1992), Herbert v.
18 Boardman, 349 A.2d 710 (Vt. 1975). CVPS cannot pursue alter ego
19 liability and similar derivative liability claims against the
20 Herberts under Vermont state law, and, at the same time, assert
21 that core jurisdiction is absent because Vermont does not
22 recognize alter ego or derivative liability. One might argue
23 that the injunction exceeds the bankruptcy court's core
24 jurisdiction for alter ego and derivative liability claims

1 because it protects the Herberts from all claims "of any kind of
2 nature, direct or derivative." Canney, Adv. Proceeding No. 97-
3 1036, at 2. However, we need not consider whether there was an
4 arguable jurisdictional basis for the potential reach of the
5 injunction because all of CVPS's state claims are based on alter
6 ego or derivative liability, or relate to the debtor-creditor
7 relationship, and hence are at least arguably part of the core
8 proceedings in the bankruptcy court.

9 In sum, we conclude that the bankruptcy court did not
10 "plainly usurp[]" its power and that there was an arguable basis
11 for jurisdiction. Nemaizer, 793 F.2d at 65. Therefore we
12 conclude that the district court properly denied CVPS's Rule
13 60(b)(4) motion.

14 **III. CONCLUSION**

15 For the foregoing reasons, we AFFIRM the district court's
16 denial of CVPS's Rule 60(b)(4) motion.